Supreme Court, U.S.
FILED
MAR 15 1999
OFFICE OF THE CLERK

No. 98-1289

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HISTORIC GREEN SPRINGS, INC., *Petitioner,*

v.

VIRGINIA VERMICULITE, LTD., ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION, THE LAND TRUST ALLIANCE, AND THE NATURE CONSERVANCY AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
Paul W. Edmondson
Elizabeth S. Merritt
Edith M. Shine
NATIONAL TRUST FOR HISTORIC PRESERVATION
1785 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-6035

Phillip J. Weiser
Associate Professor
UNIVERSITY OF COLORADO SCHOOL OF LAW
Boulder, CO 80309
(303) 735-2733

Robert A. Long, Jr.
Counsel of Record
Michael S. Labson
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 662-6000

Counsel for Amici Curiae

March 1999

2018

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The National Trust for Historic Preservation in the United States ("National Trust"), the Land Trust Alliance, and the Nature Conservancy submit this brief as *amici curiae* in support of the petition for a writ of certiorari filed by Historic Green Springs, Inc. ("HGSI").[1]

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[1] Pursuant to Supreme Court Rule 37.6, the National Trust, the Land Trust Alliance, and the Nature Conservancy hereby state that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than the National Trust, the Land Trust Alliance, the Nature Conservancy, or their members has made a monetary contribution to the preparation or submission of this brief. Petitioner HGSI is a member of the National Trust. Pursuant to Supreme Court Rule 37.3(a), the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

INTERESTS OF THE *AMICI CURIAE*

The National Trust is a private, nonprofit, charitable and educational organization chartered by Congress in 1949 to further the historic preservation policies of the United States and to "facilitate public participation" in historic preservation. 16 U.S.C. §§ 461, 468. With the support of its 265,000 members, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government.

The Land Trust Alliance is a national nonprofit organization dedicated to fostering private, voluntary land conservation. Its mission is to strengthen the work of local and regional land trusts nationwide, by providing information and education, fostering supportive public policies, and building public awareness of land trusts and their goals. More than 700 land trusts are members of the Land Trust Alliance, and many others benefit from its programs. The Land Trust Alliance publishes numerous books and reference materials, including the *Conservation Easement Handbook* and the *Standards and Practices Guidebook*, publications which set professional standards to guide the work of land trusts and organizations holding conservation easements. The Land Trust Alliance's Information Center fields more than 2,000 requests for information each year from landowners, government officials, the media, land trusts, and others who have questions about voluntary land conservation.

The Nature Conservancy is a nationwide nonprofit organization with nearly one million members dedicated to the preservation of plants, animals and natural communities. The Nature Conservancy's primary interest is in the preservation of plants and animals that represent the diversity of life on earth by protecting the lands and waters they need to survive. It has operated in the United States for the past 40

years. The Nature Conservancy owns and manages more than 1,500 preserves throughout the United States, making it the operator of one of the largest private systems of nature sanctuaries in the world. The Nature Conservancy acquires conservation lands through a combination of gifts of land and outright purchases. In 1998, the Nature Conservancy protected conservation lands valued at $160 million.

The National Trust, the Land Trust Alliance, and the Nature Conservancy all have a strong interest in ensuring the continued use, validity, and effectiveness of conservation easements and land donations such as those challenged under the antitrust laws in this case. Conservation easements and land donations are important land-use tools that serve to protect hundreds of thousands of acres of historically and environmentally sensitive resources across the country. The Fourth Circuit's ruling that the receipt of donated land by a nonprofit preservation organization may be subject to antitrust challenge directly threatens the continued viability of conservation easements and land trusts. Accordingly, *amici* have a substantial stake in the outcome of this case.

INTRODUCTION AND SUMMARY

The broad language of the Sherman Act has been given content through a common-law process of judicial decisionmaking. *See State Oil Co. v. Khan*, 118 S. Ct. 275, 284 (1997); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978). This Court has recently reaffirmed its commitment to reviewing and correcting judicially fashioned antitrust rules. *See NYNEX Corp. v. Discon, Inc.*, 119 S. Ct. 493, 498 (1998); *State Oil*, 118 S. Ct. at 284-85. Similarly, the Court has shown concern for the coherent development of antitrust doctrine thrown into confusion by conflicts of circuit authority. *See, e.g., California Dental Ass'n v. Federal Trade Comm'n*, No. 97-1625 (argued Jan. 13, 1999).

In this case, the Fourth Circuit significantly expanded the scope of the Sherman Act, and departed from well-established precedent, by holding that a nonprofit organization exposes itself to treble damages liability by accepting a charitable donation in furtherance of the organization's mission to preserve a National Historic Landmark District.[2] In reaching this surprising result, the Fourth Circuit eroded the fundamental distinction between commercial conduct that is subject to the Sherman Act and noncommercial conduct that falls outside the scope of the Act.

The Fourth Circuit's decision creates the potential for great confusion in this important area of the law, and subjects charitable and other nonprofit organizations pursuing noncommercial objectives to the threat of antitrust litigation. This Court should grant review to resolve the conflict of authority created by the Fourth Circuit's ruling, and to re-establish the basic principle that nonprofit organizations pursuing noncommercial social and policy objectives are not subject to the antitrust laws.

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[2] The Green Springs National Historic Landmark District is listed on the National Register of Historic Places and has been designated by the Secretary of the Interior as a National Historic Landmark ("NHL"). U.S. Department of the Interior, *National Historic Landmarks* 139 (1976).

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION UNDERMINES ANTITRUST PRINCIPLES ESTABLISHED BY THIS COURT AND CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS.

A. Noncommercial Activities Are Beyond The Scope Of The Sherman Act.

By its terms, the Sherman Act applies only to "trade or commerce." 15 U.S.C. §§ 1, 2. Accordingly, it is well-settled that noncommercial activities are outside the scope of the Act. This Court has recognized that the proscriptions of the Sherman Act are "tailored . . . for the business world," *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961), and that the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives," *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959). *Accord United States v. Brown Univ.*, 5 F.3d 658, 665 (3d Cir. 1993) ("It is axiomatic that section one of the Act regulates only transactions that are commercial in nature."); 1A Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 262 (1997) ("[T]he antitrust laws reach only 'commercial' restraints on trade.").[3]

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[3] The legislative history of the Sherman Act confirms that "the drafters never intended to condemn properly defined noncommercial activities." 1A Areeda & Hovenkamp, *supra*, ¶ 262. Senator Sherman responded to a proposal to add an express exemption for temperance societies and other organizations established to pursue moral and social ends by explaining that:

(...continued)

To be sure, nonprofit organizations are not entitled to blanket immunity from the antitrust laws, and are subject to antitrust scrutiny when they engage in commercial behavior.[4] But "it is a leap from the conclusion that charitable form confers no immunity to the conclusion that charitable activities are subject to the Sherman Act when they do not constitute trade in the sense of the common law." *Dedication and Everlasting Love to Animals v. Humane Society*, 50 F.3d 710, 713 (9th Cir. 1995) [hereinafter *DELTA*].

The Court has applied these basic principles to establish limits on the scope of the Sherman Act, and has enforced those limits to protect noncommercial activities such as a labor union strike,[5] the political efforts of an industry trade group,[6] and a civil rights boycott.[7] Federal courts of appeals have applied the same principles to protect

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> I do not see any reason for putting in [an amendment concerning] temperance societies any more than churches or school-houses or any other kind of moral or educational associations that may be organized. Such an association is not in any sense a combination or arrangement made to interfere with interstate commerce . . . .

Missouri v. National Org. for Women, Inc., 620 F.2d 1301, 1309 (8th Cir.) (quoting 21 Cong. Rec. 2,658-59 (1890)), *cert. denied*, 449 U.S. 842 (1980); *see also National Org. for Women, Inc. v. Scheidler*, 968 F.2d 612, 621 (7th Cir. 1992) ("We are convinced by the economic and legislative history of the Sherman Act that it was intended to prevent business competitors from making restraining arrangements for their own economic advantage. . . . Defendants are not involved in business, and have no ability to concentrate economic power."), *rev'd in part on other grounds*, 510 U.S. 249 (1994).

[4] *See NCAA v. Board of Regents*, 468 U.S. 85, 100 n.22 (1984).

[5] *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 512-13 (1940).

[6] *Noerr*, 365 U.S. at 129-31.

[7] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)

the accreditation of educational institutions,[8] women's rights boycotts,[9] abortion protests,[10] and the solicitation of charitable contributions.[11] Although some of these activities are protected under the First Amendment, the "Sherman Act's limitation to 'commercial' activities immunizes many acts that the First Amendment does not protect." 1A Areeda & Hovenkamp, *supra*, at ¶ 262.

In deciding the cases cited above, this Court and other courts of appeals have taken great care to define commercial activity in a way that does not sweep in fundamentally noncommercial conduct. These decisions stand in sharp contrast to decisions during the earlier part of this century, in which antitrust courts considered claims that the activities of labor unions, including strikes, boycotts, and other means of protesting adverse working conditions, violated the Sherman Act. Prior to this Court's decision in *Apex Hosiery*, courts regularly entertained such suits and thereby undermined the efforts of organized labor. Similarly, antitrust courts sometimes applied the Sherman Act to condemn political activity undertaken by financially disinterested actors. For example, in *Council of Defense v. International Magazine Co.*, the court of appeals concluded that a boycott of Hearst newspapers by a group of citizens concerned about the paper's political leanings violated the Sherman Act. *See* 267 F. 390, 411-12 (8th Cir. 1920). The Fourth Circuit's decision resurrects the reasoning of these older cases, contrary to this Court's recognition in *Apex Hosiery*, *Noerr*, and *Claiborne*

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[8] *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc.*, 432 F.2d 650, 654 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

[9] *National Org. for Women*, 620 F.2d at 1319.

[10] *Scheidler*, 968 F.2d at 621-23.

[11] *DELTA*, 50 F.3d at 712-13.

Hardware that noncommercial conduct is immune from antitrust scrutiny.

B. Under The Fourth Circuit's Decision, Noncommercial Activities Are Exposed To Antitrust Liability.

Although the Fourth Circuit's decision purports to reach only commercial activities, *see* Pet. App. 10a, the decision adopts a flawed test to distinguish commercial activity from noncommercial activity. The basic error in the Fourth Circuit's analysis is its overly broad concept of commercial activity as including any activity that has a discernible effect on a commercial market confers an economic benefit on the defendant. *See* Pet. App. 11a. The Fourth Circuit's approach exposes a broad range of legitimate social and political activities to potential attack as violations of the Sherman Act.

This Court has made clear that conduct is not rendered "commercial" merely because it has an effect on competition. Although noncommercial activity often has some impact on the competitive marketplace, the Sherman Act was not intended "to serve as a comprehensive code to regulate and police all kinds and types of interruptions and obstructions to the flow of trade." *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 806 (1945); *see also DELTA*, 50 F.3d at 714 ("Not every aspect of life in the United States is to be reduced to . . . a single-minded vision of the ubiquity of commerce."). In *Noerr*, the Court declined to "permit[] an extension of the Sherman Act . . . simply because those activities have a commercial impact." 365 U.S. at 140-41; *accord Scheidler*, 968 F.2d at 620 ("Congress did not intend to reach every activity that might affect business."). Whether in the context of political activity, as in *Noerr*, or other noncommercial conduct, it is difficult to envision activities that do not have at least arguable commercial effects. Consequently, a simple "effects test" is over-inclusive.

The Fourth Circuit's "benefits" test is as all-encompassing as its "effects" test. Professors Areeda and Hovenkamp have explained that the appropriate test is whether "the antitrust defendants are likely to receive direct economic benefit *as a result of any reduction in competition in the market in which the target firm or firms operate*." 1A Areeda & Hovenkamp, *supra*, at ¶ 262 (emphasis added). This approach accords with the Court's decision in *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), that the "reasoning in *Claiborne Hardware* is not applicable to a boycott conducted by business competitors who 'stand to profit financially from a lessening of competition in the boycotted market.'" *Id.* at 427 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 (1988)).[12]

In this case, Respondent HGSI received an economic benefit in the form of a donation of land. But that benefit does not result from a decrease in competition in the vermiculite market. HGSI does not participate in the vermiculite market and does not stand to benefit from a decrease in competition in that market. If anything, a decrease in competition would harm HGSI and its members as consumers of products containing vermiculite.[13]

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[12] The Fourth Circuit erred in concluding that *Trial Lawyers* limits the reasoning of *Claiborne Hardware* to cases in which the defendant is "financially disinterested." Pet. App. 12a n.2. *Trial Lawyers*, and the *Allied Tube* case it follows, support the proposition that anticompetitive conduct by a business competitor who stands to profit from a lessening of competition is fundamentally commercial in nature; those cases provide no support for the quite different proposition that conduct by a non-competitor who does not stand to profit from a decrease in competition is also commercial in nature.

[13] As the district court explained, the activities of a nonprofit preservation organization are comparable to those of abortion (...continued)

In short, if the mere existence of economic effects or the receipt of economic benefits renders activity "commercial" in nature, then virtually all activity will be deemed "commercial" for purposes of the antitrust laws. Under such an approach,

> the Sherman Act embraces everything from a church fair to the solicitation of voluntary blood donors. On this basis, every engagement or marriage would be a restraint of trade, subject to suit and defensible only by application of the rule of reason.

DELTA, 50 F.3d at 714.[14]

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protestors and temperance activists considered by other federal courts and the Congress that enacted the Sherman Act:

> All wish to extinguish a class of producers: those dealing with abortions, liquor, and vermiculite. . . . None profit financially from reducing the supply and increasing the price of their targets – their goal – achieved by a sustained campaign against, as the case may be, abortionists, saloonists, or vermiculite producers. . . . None is alleged to have market power. The object of each is properly classified as political or social.

Pet. App. 38a (citations omitted).

[14] The district court in this case similarly warned that:

> HGSI does not derive pecuniary gain from suppressing vermiculite mining; to the extent that its land values are enhanced by a cessation of mining, this benefit is merely incidental to its overriding goal of preserving land for nonpecuniary reasons. Secondary benefits such as this redound to most, if not all, charitable organizations and quintessentially noncommercial institutions. . . . *Accepting the presence of such benefits as evidence of commercial activity would easily bring virtually any transaction within the scope of the Sherman Act.*

Pet. App. 40a (emphasis added).

The Fourth Circuit's approach jettisons the limiting principle that a nonprofit organization is not engaged in commercial activity unless it stands to benefit from the alleged reduction in competition. As a result, the Fourth Circuit's decision expands the scope of the Sherman Act beyond its proper limits, in violation of basic and longstanding principles established by this Court.

C. The Fourth Circuit's Test For Distinguishing Between Commercial And Noncommercial Conduct Conflicts With Decisions Of Other Circuits.

The Fourth Circuit's definition of commercial activity not only subjects noncommercial conduct to antitrust scrutiny in violation of this Court's prior rulings, but also conflicts with the approaches adopted by other circuits.

First, the Fourth Circuit's decision conflicts with the Ninth Circuit's decision in *DELTA* by holding that receipt of a charitable donation is a commercial benefit sufficient to render a transaction commercial in nature. In *DELTA*, the Ninth Circuit held that "the solicitation of contributions by a nonprofit organization is not trade or commerce" for purposes of the Sherman Act, and therefore the receipt of charitable donations does not violate the Sherman Act even though the recipient "derives reputation, prestige, [and] money for its officers" from the donations. 50 F.3d at 712, 714. In contrast, the Fourth Circuit concluded in this case that the charitable donations received by HGSI were commercial because HGSI received "pecuniary gain" and other benefits from the preservation of the donated land. Pet. App. 11a.

Second, the Fourth Circuit's decision conflicts with the D.C. Circuit's decision in *Marjorie Webster* by holding that a defendant who is not a business competitor can be liable under the antitrust laws absent an anticompetitive intent. The Fourth Circuit, in contrast, held that HGSI's

motive is irrelevant. Pet. App. 11a-12a. In *Marjorie Webster*, the D.C. Circuit held that, in the context of non-competitor defendants, "an incidental restraint of trade absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws." 432 F.2d at 654. The D.C. Circuit's approach is echoed by the Eighth Circuit's decision in *National Organization for Women*, which states that "the organization and objectives involved can make a difference in the application of the Act." 620 F.2d at 1310.

These conflicts, which are discussed in greater depth in the petition for certiorari, *see* Pet. 8-19, will create confusion in the application of the Sherman Act and warrant this Court's review.

* * *

The Fourth Circuit's decision disregards this Court's admonitions about the distinct character of nonprofit organizations pursuing noncommercial objectives, and treats HGSI as if it were a competitor in the vermiculite mining market. Just as the boycotters in *Claiborne Hardware* did not stand to profit financially from a lessening of competition in the boycotted market, 458 U.S. at 914-15, HGSI does not stand to profit financially from a lessening of competition in the vermiculite market. This Court should grant review to ensure that the Sherman Act is not applied to conduct that it was never intended to reach.

II. THE FOURTH CIRCUIT'S DECISION THREATENS TO DETER SOCIAL ACTION BY NONPROFIT ORGANIZATIONS.

The Fourth Circuit's decision will have very significant practical consequences. Most importantly, the threat of antitrust litigation will deter nonprofit organizations from pursuing activities that further the organization's social and policy objectives, but are not constitutionally protected

like the boycott in *Claiborne Hardware* or the government petitioning in *Noerr*. In particular, nonprofit organizations such as *amici curiae* will face new legal risks in accepting donations of property subject to conservation deed restrictions, or placing conservation easements on land to further their noncommercial goals.

A. The Fourth Circuit's Decision Expands The Scope Of Antitrust Liability.

Nonprofit groups pursuing noneconomic social objectives will be vulnerable to antitrust attack under the Fourth Circuit's rule. Whether the objective is preserving land in an undeveloped state, discouraging smoking, or encouraging the use of public transportation instead of automobiles, commercial enterprises can be expected to look for ways to discourage and defeat activities that pose a threat to their businesses.

The Fourth Circuit's decision retains the protections provided by *Noerr* and *Claiborne Hardware* against use of the antitrust laws when the challenged activity implicates constitutionally protected rights. But protection from antitrust attack vanishes under the Fourth Circuit's decision when nonprofit organizations elect to pursue other avenues to achieve social or policy goals, as HGSI did here.

Nothing in the Sherman Act or this Court's prior decisions supports the Fourth Circuit's approach. As Professors Areeda and Hovenkamp have noted, the "Sherman Act's limitation to 'commercial' activities immunizes many acts that the First Amendment does not protect." Areeda & Hovenkamp, *supra*, at ¶ 262. Noncommercial conduct does not become any more commercial simply because it falls outside the protections of the Constitution. Legitimate noncommercial social and political action should remain immune from antitrust scrutiny, whether or not it implicates the First Amendment.

B. Conservation Restrictions On The Use Of Land Are An Important Noncommercial Activity Now Potentially Subject To Antitrust Liability.

Conservation easements, deed covenants and restricted donations are used across the country by land trusts and conservation organizations to protect sensitive historic and environmental resources. Congress has recognized the social importance of such preservation efforts, and indeed has encouraged them by granting tax deductions for the donation of land or conservation easements on land to qualified nonprofit organizations. *See* 26 U.S.C. § 170(h). More than four million acres nationwide are protected through the use of these preservation mechanisms, including roughly 740,000 acres protected by conservation easements alone.[15]

Although easements originated centuries ago in common law, conservation easements, deed covenants and restricted donations have achieved widespread recognition in the last two decades as important tools for protecting historic and environmental resources. More than 1,000 nonprofit organizations and governmental agencies across the country hold preservation easements and similar interests in land.[16] Forty-seven states, including the Commonwealth of Virginia, specifically allow nonprofit organizations and state agencies to accept easement donations.[17] Without such public and private efforts to preserve and protect these vast areas rich in historic and environmental resources, they would be lost to future generations.

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[15] Land Trust Alliance, *1994 National Land Trust Survey*, Summary (1995 Revised).

[16] *Id.*

[17] *Id.*

The Green Springs National Historic Landmark District is just such an area. The 14,000 acre District, named for a mineral spring that served as a spa in the late 1700's, includes 35 homes and numerous early outbuildings, farm structures, simple country churches and rural crossroads villages that contribute to the national significance of the District. National Historic Landmark status is reserved for "properties of exceptional [historic] value to the nation as a whole." 36 C.F.R. § 65.2(a); *see* 16 U.S.C. § 470a(a). A total of 2,211 sites nationwide have received the National Historic Landmark designation; only 155 of these are National Historic Landmark Districts.

Under the Fourth Circuit's decision, land donations for conservation purposes will be subject to antitrust challenge. Such donations typically can be viewed as having "commercial effects" (*e.g.*, the restriction of activities inconsistent with conservation and preservation) and conferring benefits (*e.g.*, a land transfer) on the recipient organization. But when the organization accepting the transfer is not a market participant and does not stand to benefit from an alleged reduction in competition, the transfer is fundamentally noncommercial and should trigger no threat of antitrust liability.

C. The Fourth Circuit's Decision Will Require Courts To Weigh Costs and Benefits They Are Ill-Equipped to Compare.

If the Fourth Circuit's approach is followed, courts will be required to weigh alleged anticompetitive effects against the pursuit of social and policy goals that are not susceptible to traditional economic analysis. As it is, antitrust courts struggle to weigh the purely economic effects of traditional commercial conduct under the rule of reason. *See United States v. Topco Assocs.*, 405 U.S. 596, 609 (1972) ("The fact is that courts are of limited utility in examining difficult economic problems."). That inquiry becomes far

more difficult when courts must compare both economic and non-economic factors.

The immunity rule recognized in *Claiborne Hardware* serves not only to protect noncommercial political action, but also to save antitrust courts from the impossible task of balancing economic effects against non-economic social and policy goals. *See* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 743-44 (1991). In this case, for example, a federal district court is not equipped to determine whether alleged competitive harm in the vermiculite market outweighs the public's interest in preserving historically significant and environmentally valuable undeveloped tracts of land. Under the Fourth Circuit's ruling, however, courts will be called upon to weigh such incommensurable factors.

III. THE LEGAL ISSUES PRESENTED BY THIS CASE ARE RIPE FOR THIS COURT'S REVIEW.

This Court has granted review in numerous cases to resolve antitrust issues prior to a trial on the merits. To cite two recent examples, this Court granted certiorari in *NYNEX Corp. v. Discon* to review a circuit court decision reversing a district court's order granting a motion to dismiss, and in *State Oil v. Khan* to review a circuit court decision reversing a district court's order granting a motion for summary judgment. In neither case did the Court consider it appropriate to await the outcome of a trial on the merits. In this case, as in *Discon* and *Khan*, a trial cannot be expected to shed additional light on the legal questions presented by the petition.

Immediate review of the antitrust immunity question in this case is particularly appropriate so as not to deter nonprofit organizations from continuing to engage in efforts to further their social and policy goals. For many nonprofit organizations that operate on limited budgets, even the threat

of antitrust litigation is a powerful deterrent. Review by this Court at this time is crucial in light of the importance of the questions presented, and the significant confusion and uncertainty created by the Fourth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

Paul W. Edmondson
Elizabeth S. Merritt
Edith M. Shine
NATIONAL TRUST FOR HISTORIC PRESERVATION
1785 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-6035

Phillip J. Weiser
Associate Professor
UNIVERSITY OF COLORADO SCHOOL OF LAW
Boulder, CO 80309
(303) 735-2733

Robert A. Long, Jr.
Counsel of Record
Michael S. Labson
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 662-6000

Counsel for Amici Curiae

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